

No. 44171-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sandra Gatten,

Appellant.

Clark County Superior Court Cause No. 12-1-01677-1

The Honorable Judge Robert Lewis

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial erroneously included in Ms. Gatten's offender score prior convictions that were facially invalid.
2. The trial court erred by including in the offender score Ms. Gatten's 2007 convictions for false verification.
3. The 2007 convictions were constitutionally invalid on their face because her guilty pleas were not knowing, intelligent, and voluntary.
4. Ms. Gatten's multiple convictions for false verification were entered in violation of her right to be free from double jeopardy because they were based on a single falsehood.
5. The trial court failed to properly determine Ms. Gatten's offender score.
6. Ms. Gatten's 2007 theft conviction should not have scored separately because it was previously found to be the same criminal conduct as the false verification charges.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An offender score may not include a prior conviction that is constitutionally invalid on its face. Ms. Gatten's 2007 convictions are facially invalid because the plea form does not establish that she made a knowing, intelligent, and voluntary waiver of her constitutional rights. Must Ms. Gatten's unlawful sentence be vacated and the case remanded for resentencing without the 2007 convictions?
2. Double jeopardy prohibits multiple convictions for a single offense. Here, Ms. Gatten's multiple convictions for false verification stemmed from a single falsehood. Were Ms. Gatten's prior convictions for false verification improperly included in her offender score because they were facially invalid?

3. In calculating the offender score, prior offenses which were found to encompass the same criminal conduct shall be counted as one offense. Here, Ms. Gatten's 2007 theft conviction was found to be the same criminal conduct as her false verification convictions. Did the trial court err by counting the 2007 conviction separately in the offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2007, Sandra Gatten was convicted of welfare fraud. She had falsely completed her application paperwork, claiming that her son lived with her when he did not. She received a total of seven checks based on this falsehood. She pled guilty to one count of Theft in the First Degree, and seven counts of False Verification. Motion to Clarify Criminal History (including attachments), Supp. CP. The parties agreed and the sentencing court found that the theft charge comprised the same criminal conduct as the false verification charges. *See* Judgment and Sentence (2007), p.3; Statement of Defendant on Plea of Guilty (2005), p.2; *and* Offender Score Sheet (attachments to Motion to Clarify Criminal History filed 11/6/12), Supp. CP.

In 2012, Ms. Gatten was charged with Burglary in the Second Degree, and again, she pled guilty. CP 1; Statement of Defendant on Plea of Guilty, Supp. CP. She argued that her false verification convictions should score as one point because her ongoing conduct was a single unit

of prosecution. Motion to Clarify Criminal History, State's Sentencing Brief, Motion to Clarify - Reply, Supp. CP.

The last page of Ms. Gatten's plea form (for the 2007 convictions) includes a set of check boxes for the judge who accepts the plea to indicate whether the defendant read the statement herself, had it read to her, or reviewed it with an interpreter. Statement of Defendant on Plea of Guilty (2005), p.8 (attachment to Motion to Clarify Criminal History), Supp. CP. The judge who accepted her plea did not complete that portion of the form or otherwise indicate any findings on the subject. Statement of Defendant on Plea of Guilty (2005), p.8 (attachment to Motion to Clarify Criminal History), Supp. CP.

The court ruled that Ms. Gatten's prior convictions for false verification scored as one point each, contributing a total of seven points to her offender score. RP 25. The trial judge added one point for the 2007 theft conviction, and one point for a prior drug charge. RP 25. Ms. Gatten was sentenced with an offender score of nine;¹ she received a prison-based Drug Offender Sentencing Alternative. CP 3.

Ms. Gatten timely appealed. CP 15.

¹ In place of a finding on Ms. Gatten's criminal history, the judgment and sentence reads "See attached criminal history." No statement of criminal history is attached. CP 3. The court's offender score calculation is set forth orally in the transcript. RP 22-25.

ARGUMENT

I. MS. GATTEN’S OFFENDER SCORE WAS IMPERMISSIBLY BASED ON PRIOR CONVICTIONS THAT ARE CONSTITUTIONALLY INVALID.

A. Standard of Review.

Improper sentences raise questions of law, which are reviewed *de novo*. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

Challenges to unlawful sentences may be made for the first time on appeal. *State v. Sims*, 171 Wn.2d 436, 444, 256 P.3d 285 (2011).

B. An offender score may not be based on a prior conviction that is constitutionally invalid on its face.

A trial court must hold a sentencing hearing before imposing sentence. RCW 9.94A.500(1). The court generally calculates the offender score by adding the defendant’s current offenses and prior convictions. RCW 9.94A.589(1)(a). The offender score is then used to determine the sentencing range. *Id.*

The offender score may not be based on a prior conviction that is “constitutionally invalid on its face.” *State v. Jones*, 110 Wn.2d 74, 77, 750 P.2d 620 (1988). A person’s constitutional rights are “denied anew” when a constitutionally infirm conviction is used to increase the sentence

on a new charge. *Burget v. Texas*, 389 U.S. 109, 116, 88 S.Ct. 258, 19 L.Ed. 319 (1967).²

A prior conviction is constitutionally invalid on its face if the constitutional infirmities are apparent without “further elaboration” through outside evidence. *State v. Gimarelli*, 105 Wn.App. 370, 375, 2 P.3d 430 (2001) (citing *In re Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) (Thompson I)). The face of a conviction includes documents signed as part of a plea agreement. *State v. Thompson*, 143 Wn. App. 861, 867, 181 P.3d 858 (2008) (Thompson II).

Prior convictions may be constitutionally invalid for a variety of reasons. See e.g. *In re Thompson*, 141 Wn.2d at 719 (conviction invalid on its face because of *ex post facto* violation); *In re Stoudmire*, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000) (conviction invalid on its face because charges filed outside of the statute of limitations); *State v. Phillips*, 94 Wn. App. 313, 319-20, 972 P.2d 932 (1999) (juvenile’s diversion agreement invalid on its face because it failed to show a valid waiver of his right to counsel).

² The state does not bear the burden of proving the constitutional validity of prior convictions used for sentencing purposes. *State v. Irish*, 173 Wn.2d 787, 272 P.3d 207 (2012). That holding, however, is inapposite to Ms. Gatten’s case. The *per curiam* opinion in *Irish* did not address the rule regarding facial constitutional invalidity set forth in *Jones*. 110 Wn.2d at 77.

- C. Each of Ms. Gatten's 2007 convictions is constitutionally invalid on its face because her guilty pleas were not knowing, intelligent, and voluntary.

A guilty plea requires waiver of the constitutional rights to trial by jury, confrontation of witnesses, and the privilege against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea is invalid unless it is made knowingly, voluntarily, and intelligently. *Id.*; U.S. Const Amends. V, VI, XIV; Wash. const. art. I, §3. Furthermore, due process requires an affirmative showing that a guilty plea has been entered intelligently and voluntarily. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A voluntary guilty plea requires that the accused be informed of and understand all of the direct consequences of the plea.³ *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009).

Ms. Gatten's 2007 convictions used the standard guilty plea form provided by CrR 4.2. Statement of Defendant on Plea of Guilty, p.8 (attachment to Motion to Clarify Criminal History), Supp. CP. Before the judge signs the form, the court is directed to check one of three boxes:

³ In addition, a guilty plea is invalid if the offender is misinformed about collateral matters where the consequences are clear. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

☐ (a) The defendant had previously read the entire statement above and that the defendant understood it in full;

☐ (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or

☐ (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full...

Statement of Defendant on Plea of Guilty, p.8 (attachment to Motion to Clarify Criminal History), Supp. CP. None of the boxes are checked on Ms. Gatten's plea form. Statement of Defendant on Plea of Guilty, p.8 (attachment to Motion to Clarify Criminal History), Supp. CP

The 2007 plea form fails to demonstrate on its face that she had read or been read the agreement in its entirety. Thus, it does not exhibit valid waiver of her constitutional rights or that she was informed of all of the direct consequences of her guilty plea.

Ms. Gatten's 2007 convictions are constitutionally invalid on their face. *Bradley*, 165 Wn.2d at 939. Accordingly, the trial court erred in including them in the offender score calculation for the current charge. *Jones*, 110 Wn.2d at 77. Ms. Gatten's sentence must be vacated, and the case remanded for resentencing. *Id.* The offender score should not include any points stemming from Ms. Gatten's welfare fraud convictions. *Id.*

- D. Ms. Gatten's multiple prior convictions for false verification are facially invalid because they violate double jeopardy.

The double jeopardy clauses of the United States and Washington Constitutions protect against multiple convictions for the same offense. *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010); *Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); U.S. Const. Amend. V, XIV; Wash. const. art. I, §9. This inquiry turns on the unit of prosecution for the offense in question. *Hall*, 168 Wn.2d at 729-30. The unit of prosecution can be either a single act or a course of conduct. *Id.*, at 731.

The unit of prosecution is determined through a multi-step approach. First, the court looks to the language of the statute. Second, the court examines the statutory history to determine the intent of the legislature. Third, the court analyzes the facts of the case. *Hall*, 168 Wn.2d at 730. If the legislature fails to define the unit of prosecution or the legislative intent is unclear, the rule of lenity requires the ambiguity to be resolved in the favor of the accused. *Id.* at 730.

In *Hall*, the court found the unit of prosecution for witness tampering to be a course of conduct directed at a single witness. The court reversed Hall's conviction for multiple counts of tampering based on repeated phone calls to one person. 168 Wn.2d at 731. The *Hall* court

focused on the “evil the legislature has criminalized.” *Id.* The court held that the relevant “evil” was the attempt to induce a witness to testify falsely. The *number* of attempts was “secondary to the statutory aim.” *Id.*

Similarly, the unit of prosecution for solicitation to commit murder involves a course of conduct, not a single act. *State v. Jensen*, 164 Wn.2d 943, 956, 195 P.3d 512 (2008). Multiple conversations confirming a previously-formed plan and do not give rise to separate counts of solicitation to commit murder. *Id.*, at 956.

1. The language of the statute suggests Ms. Gatten was guilty of only one unit of prosecution.

Ms. Gatten was convicted of seven separate counts of false verification, based on a single falsehood repeated multiple times throughout 2003 and 2004. At that time, the statute provided in relevant part:

Any applicant for or recipient of public assistance who willfully makes and signs any application, statement, or other paper which contains or is verified by a written declaration that is made under the penalties of perjury and which he or she does not believe to be true and correct as to every material matter is guilty of a class B felony punishable according to chapter 9A.20 RCW.

Former RCW 74.08.055 (2004).

The language of the statute suggests that false verification involves a continuing course of conduct rather than a single act. The evil criminalized by the legislature is the verification of false information in

seeking public benefits. The number of signatures on forms verifying the same false information is secondary. To hold otherwise would grant the Department of Social and Health Services the power to fabricate innumerable separate crimes, simply by asking an applicant to sign additional documents containing the same false information.

Even if the statute were unclear, the ambiguity must be construed in favor of the accused. *Hall*, 168 Wn.2d at 730. Applying the rule of lenity, the statute must be construed in favor of finding Ms. Gatten liable for only one count of false verification for her ongoing conduct based on a single falsehood. *Id.*

2. The legislative history does not demonstrate that the legislature intended to punish separately multiple transactions based on a single falsehood.

The false verification statute was enacted in 1953. Laws of 1953, ch. 174, §27. It had not been amended by the time Ms. Gatten pled guilty in 2003 and 2004.⁴ Thus, the statutory aim had not been altered or clarified in the years between 1953 and 2004. Nothing in the history of the statute suggests a legislative desire to punish each individual act rather than a course of conduct relating to a single falsehood.

⁴ In 1979, the word “director” was changed to “secretary.” Laws of 1979, ch. 141, § 323.

3. The facts suggest Ms. Gatten was guilty of only one unit of prosecution.

In both *Hall* and *Jensen*, the Supreme Court found that the facts supported a course-of-conduct unit of prosecution. 168 Wn.2d at 736; 164 Wn.2d at 956. Likewise, here, each of Ms. Gatten's convictions was based on the same falsehood.

The factual bases for each of Ms. Gatten's seven guilty pleas were identical except for the date.⁵ Each count was based on the same piece of false information supplied to the same department. Ms. Gatten's trial attorney provided the sentencing court with letters from DSHS indicating that each overpayment related to the fact that her son was not living with her after January of 2003. Letters from DSHS (attachments to Motion to Clarify Criminal History), Supp CP. Ms. Gatten verified only *one* material misrepresentation to DSHS: that her son continued living with her in 2003 and 2004. *Id.* She repeated this same falsehood multiple times.

⁵ Ms. Gatten's 2007 plea form provides the factual bases for counts 2-8 as follows:

I did in Clark County, State of Washington on the following dates (each being a separate count of the information) to wit: March 10, 2003, April 10, 2003, June 17, 2003, October 27, 2003, November 10, 2003, March 30, 2004, and July 2, 2004 did willfully make and subscribe an application, statement or paper containing or verified by a written declaration that it was made under the penalties of perjury to wit: application for benefits to which I did not believe to be true and correct as to wevery [sic] material matter.

Statement of Defendant on Plea of Guilty, p.8, Supp. CP.

Thus the facts support a single unit of prosecution based on an ongoing course of conduct rather than seven separate incidents. *See Hall, supra*.

Because her 2007 convictions for seven counts of false verification violated double jeopardy, they are constitutionally invalid in their face. The trial court erred in relying on those convictions to calculate Ms. Gatten's offender score. *Jones*, 110 Wn.2d at 77. Her sentence must be vacated and the case remanded for a new sentencing hearing. Upon resentencing, her seven false verification convictions should add only a single point to her offender score. *Id.*

II. MS. GATTEN'S FIRST-DEGREE THEFT CONVICTION WAS PREVIOUSLY FOUND TO BE THE SAME CRIMINAL CONDUCT AS HER FALSE VERIFICATION CONVICTIONS; IT SHOULD NOT HAVE SCORED SEPARATELY AGAINST HER CURRENT OFFENSE.

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Goodwin*, 146 Wn.2d 861, 867-868, 50 P.3d 618 (2002). An accused person cannot agree to a miscalculated offender score as part of a plea agreement. *In re Call*, 144 Wn.2d 315, 329, 28 P.3d 709 (2001). Challenges to unlawful sentences may be made for the first time on appeal. *Sims*, 171 Wn.2d at 444.

In calculating an offender score, prior offenses that were found to encompass the same criminal conduct "shall be counted as one offense."

RCW 9.94A.525(5)(a)(i); *State v. Wilson*, 117 Wn. App. 1, 20, 75 P.3d 573 (2003). The statute's use of the word "shall" binds the current sentencing court to the prior court's finding of same criminal conduct. *State v. Mollichi*, 132 Wn.2d 80, 86-87, 936 P.2d 408 (1997) (use of the word "shall" is presumptively mandatory). The court has no discretion to count offenses separately where there is a prior finding that they constitute one offense. RCW 9.94A.525(5)(a)(i).

In this case, the court previously found that the theft and false verification offenses constituted the same criminal conduct. The scoring sheet for Ms. Gatten's 2007 theft conviction explicitly states that it constitutes the same criminal conduct as the false verification offenses. Offender Score Sheet (attachment to Motion to Clarify Criminal History filed 11/6/12), Supp. CP. Although the box for a finding of same criminal conduct on the 2007 Judgment and Sentence is not checked, this is merely a clerical error. Judgment and Sentence (2007), p.3 (attachment to Motion to Clarify Criminal History filed 11/6/12), Supp. CP. The Judgment and Sentence and plea form both assign an offender score of seven (for each false verification charge) and one (for the theft charge). Judgment and Sentence (2007), p.3 Statement of Defendant on Plea of Guilty (2007) (attachments to Motion to Clarify Criminal History filed 11/6/12), Supp. CP. These offender scores are only possible if the theft and false

verification charges were found to encompass the same criminal conduct.⁶ RCW 9.94A.525(5)(a)(i). Because the theft and false verification offenses were previously found to have constituted the same criminal conduct, the trial court was required by RCW 9.94A.525(5)(a)(i) to again count them as one offense.

The trial court erred in scoring Ms. Gatten's prior theft and false verification convictions separately in the offender score calculation. RCW 9.94A.525(5)(a)(i). Accordingly, her sentence must be vacated and the case remanded for a new sentencing hearing. *Call*, 144 Wn. 2d at 335. Upon resentencing, her prior theft and false verification convictions should be counted as the same offense. 9.94A.525(5)(a)(i).

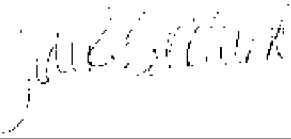
CONCLUSION

For the foregoing reasons, Ms. Gatten's judgment and sentence must be vacated, and the case remanded for a new sentencing hearing. Her 2007 convictions are facially invalid, and should not add to her offender score. In the alternative, the 2007 theft conviction should be scored as the same criminal conduct as the false verification charges.

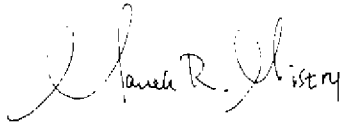
⁶ Ms. Gatten pled guilty to seven counts of false verification and one count of first degree theft. Her offender score would have been eight, rather than seven, for the false verification charges if the theft and false verification offenses had scored separately. The theft offense was assigned an offender score of one based on an unrelated 2004 conviction. Judgment and Sentence (2007), p.3 (attachment to Motion to Clarify Criminal History filed 11/6/12), Supp. CP; RCW 9.94A.525.

Respectfully submitted on April 25, 2013,

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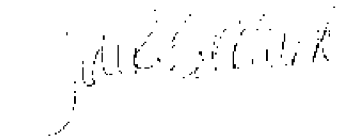
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 25, 2013.



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